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Norton Healthcare, Inc, d/b/a Norton Audubon Hospital and Nurses Professional Organization, & affiliated with the United Nurses of America, American Federation of State, County and Municipal Employees, AFL-CIO. Cases 9-CA-36909 and 9-CA-37091

January 30, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On December 9, 2002, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel and the Charging Party filed answering briefs. The General Counsel also filed limited exceptions to the judge's recommended remedy and order, a supporting brief, and a reply brief. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and affirms the judge's rulings, findings¹ and conclusions and adopts the recommended Order as modified.²

The General Counsel filed exceptions to the judge's recommended remedy and Order, arguing that they fail to include any reference to the Respondent's having unlawfully reported the discriminatee, Elizabeth Jane Gentry, to the Kentucky Board of Nursing (KBN). The General Counsel further contends that the remedy, Order, and notice should be modified to require that the Respondent reimburse Gentry, with interest, for expenses which she may have incurred while defending herself before the KBN.

¹ Some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

² Pursuant to the General Counsel's limited exceptions, we have modified the judge's recommended Order. We shall also issue a new notice reflecting these modifications.

Further, we shall substitute a narrow cease-and-desist Order for the broad one recommended by the judge.

We find merit in these exceptions. The judge found that the Respondent unlawfully reported Gentry to the KBN. It is customary for the Board to require a respondent to pay an individual's legal expenses as part of the remedy where such costs may have been incurred in connection with the unlawful conduct. See, e.g., *Webco Industries*, 337 NLRB 361 (2001) (employer ordered to pay reasonable legal expenses employee may have incurred in defending against a suit for breach of severance agreement which was preempted and retaliatory). Consistent with that precedent, we shall order the Respondent to reimburse Gentry for the reasonable expenses incurred in connection with the Respondent's unlawfully motivated referral of her to the KBN.

AMENDED REMEDY

Add the following after the second paragraph.

"The Respondent, having violated Section 8(a)(3) and (1) by reporting Elizabeth Jane Gentry to the Kentucky Board of Nursing, must reimburse her, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), for all reasonable legal expenses which she may have incurred while defending herself before the Kentucky Board of Nursing."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Norton Healthcare, Inc. d/b/a Norton Audubon Hospital, Louisville, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(b) of the judge's Order and add the following as 1(b).

"(b) Reporting any employee to the Kentucky Board of Nursing for supporting the Nurse's Professional Organization or any other union."

2. Add the following as paragraph 1(c): "(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

3. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs: "(c) Reimburse Elizabeth Jane Gentry for all reasonable legal expenses which she may have incurred while defending herself before the Kentucky Board of Nursing, plus interest as described in the amended remedy section of this Decision."

4. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. January 30, 2004

_____ Wilma B. Liebman,	Member
_____ Peter C. Schaumber,	Member
_____ Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist any union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge you, report you to the Kentucky Board of Nursing, or otherwise discriminate against any of you for supporting the Nurses Professional Organization or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Elizabeth Jane Gentry full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Elizabeth Jane Gentry whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL reimburse Elizabeth Jane Gentry for all reasonable legal expenses which she may have incurred while defending herself before the Kentucky Board of Nursing, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Elizabeth Jane Gentry, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

NORTON HEALTHCARE, INC. D/B/A NORTON
AUDUBON HOSPITAL

Donald A. Becher, Esq., for the General Counsel.

Grover C. Potts Jr. and Michelle D. Wyrick, Esqs. (Wyatt, Tarrant & Combs, LLP), of Louisville, Kentucky, for the Respondent.

Kay Tillow, of Louisville, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Louisville, Kentucky, from September 30 through October 4, 2002. On July 13, 1999, the Union, the Nurses Professional Organization, affiliated with the United Nurses of America, American Federation of State, County and Municipal Employees, AFL-CIO (NPO), filed the charge in Case 9-CA-36909, alleging, among other things, that the Respondent had terminated Jane Gentry on the previous day in violation of Section 8(a)(3) and (1) of the Act.¹ On September 29, 1999, the NPO filed the charge in Case 9-CA-37091 alleging that Respondent had filed a complaint against Gentry with the Kentucky Board of Nursing (KBN) on July 13, 1999, in violation of the Act.

Respondent contends that it terminated Gentry and reported her to the KBN for nondiscriminatory reasons. Specifically, Norton contends that it took these steps because Gentry acted "outside the scope" of her registered nurse's license in injecting one cubic centimeter (CC) of normal saline into an intravenous line (IV) attached to Faye Jeannette, a postangioplasty patient, who was complaining of chest pain and requesting an injection on the evening of June 21, 1999.

In November 1999, the National Labor Relations Board's (the Board or NLRB) Regional Director declined to issue a complaint in either case. The Union appealed this decision and on March 31, 2000, the General Counsel denied the appeal. The NPO filed a motion for reconsideration. On August 11, 2000, the motion was granted with respect to Jane Gentry's discharge, but denied with respect to allegations not relevant to this proceeding. The Regional Director issued a complaint on September 14, 2000, alleging violations both with respect to the discharge and the complaint filed with the KBN.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed

¹ The alleged discriminatee's full name is Elizabeth Jane Gentry.

by the General Counsel, Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, Norton Healthcare, Inc. operates an acute care hospital known as Norton Audubon Hospital in Louisville, Kentucky. Respondent derives gross annual revenues in excess of \$250,000 and purchases and receives goods valued in excess of \$50,000 directly from suppliers outside of Kentucky. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, the Nurses Professional Organization, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Nurses Professional Organization (NPO) began trying to organize the nurses at Audubon in the 1980s when it was operated by Humana. The Board conducted a representation election at the hospital in 1989, which the Union lost.

In 1993, Columbia Healthcare purchased the hospital. Another representation election was conducted in March 1994; the NPO lost that election as well. The Union filed numerous unfair practice charges pertaining to the 1994 election. The charges were heard by Administrative Law Judge John West who, on March 31, 1997, issued a decision recommending that the Board order Audubon Hospital to recognize and bargain with the NPO. Judge West also found numerous violations of Section 8(a)(1) of the Act. These included (1) unlawfully soliciting grievances with promises to adjust them; (2) discriminatorily enforcing rules affecting campaign literature; (3) unlawfully threatening employees by linking union support with plant closure or sale, job and benefit loss, discrimination and discipline; (4) unlawfully stating that it would not negotiate if employees selected the Union as their collective-bargaining representative; and (5) attempting to discourage employees' union support prior to the election by announcing a wage increase, new long-term insurance disability insurance benefits, increased benefits for certain part-time employees, and the establishment of a new committee to deal with registered nurse (RN) staffing issues and complaints.

Judge West also found a number of 8(a)(3) and (1) violations including a discriminatory discharge or layoff; a discriminatory discipline; discriminatory shift assignments, evaluations, and denials of employment opportunities and promotions.

In May 1998, the NPO learned that Respondent, then known as Alliant Healthcare, was in the process of purchasing the hospital. On June 30, 1998, the NPO wrote the chief executive officer of Alliant requesting that it recognize and bargain with the Union. Among the numerous signatories to this letter was Jane Gentry, a union trustee. Alliant declined to recognize and

bargain with the Union, noting that Judge West's decision was still pending before the NLRB.²

Norton assumed control of the Audubon on September 1, 1998. It assigned two new managers to operate the facility, President Thomas Kmetz and Chief Nursing Officer Mary (Cis) Gruebbel. In the fall of 1998, Norton sought from the Jefferson, Kentucky County Commission (also called the Jefferson County Fiscal Court) approval for the issuance of low interest tax-exempt bonds to facilitate its purchase of Audubon and other hospitals in the Louisville area. The NPO campaigned vigorously to condition the issuance of such bonds on Respondent's recognizing and bargaining with it. The Union testified before the Fiscal Court in support of its position and engaged in informational picketing. The Fiscal Court approved the issuance of the bonds without such conditions.

The NPO also filed a number of unfair labor practice charges against Respondent. One challenged its closing of the Audubon pediatrics unit; another challenged the closing of the obstetrics unit. The General Counsel declined to issue a complaint in both these instances.

On February 25, 1999, Respondent issued a written warning to Susan Yost, a registered nurse, who was the NPO's representative at Norton facilities. This warning was issued because Yost had called a number of Respondent's housekeeping employees to ask them if they would talk to newspaper reporters about Norton's plan to outsource the housekeeping function at the Audubon hospital. Judge Leonard Wagman found this warning to constitute a violation of Section 8(a)(1) of the Act. No exceptions were filed to this decision, which became a final order of the Board on June 16, 2000.

In the same decision, Judge Wagman also adjudicated several other unfair labor practice charges filed by the NPO shortly after it began renewed efforts to obtain authorization cards from Norton's employees. Again, in the absence of exceptions, the Board also adopted his finding that in May 1999, Norton implemented a stricter solicitation policy to interfere with employees' Section 7 rights, in violation of Section 8(a)(1) of the Act, *Norton Healthcare, Inc.*, JD-56-00 (2000).

In another decision, Judge Irwin Socoloff found that Norton violated Section 8(a)(3) and (1) of the Act between August 11, 1999, and mid-September 2000 by failing and refusing to employ Wilma McCombs, a member of the NPO executive board, as a patient support associate, because of her union and other protected activities. He also found that Norton violated Section 8(a)(1) in July 2000, by Clinical Manager Kim Blair, in telling Martha Ann Hurst, another member of the NPO executive board, that she could not discuss the Union during working hours, despite the fact that discussion of other nonwork-related subjects was permitted. The Board affirmed Judge Socoloff's

² Due to a 100-percent turnover in management and the 3-1/4 years delay in which the case was pending before it, the Board declined to adopt Judge West's recommendation of a bargaining order. It ordered a second election instead. However, the Board affirmed Judge West's findings and conclusions regarding Audubon's 8(a)(3) and (1) violations, *Audubon Regional Medical Center*, 331 NLRB 374 (2000).

The Union has "blocked" the conduct of another election pending the resolution of its unfair labor practice charges against Norton.

rulings, findings, and conclusions on the day the instant hearing began, *Norton Audubon Hospital*, 338 NLRB No. 34 (2002).

B. Jane Gentry's Career at Audubon

Jane Gentry began working as a staff nurse at the Audubon Hospital in 1981. She joined the NPO in the 1980s and was active in the Union as a trustee. At the time of her discharge, Gentry was the legislative director of the NPO. Gentry also solicited authorization cards and passed out union leaflets in front of the hospital. She also was one the signatories on the NPO's letters to Respondent. Norton has stipulated that it was well known that Gentry was a union supporter and specifically that Randa Bryan, Gentry's supervisor, was aware of this fact. Mary (Cis) Gruebbel, Respondent's chief nursing officer, who was aware of the NPO's renewed efforts in getting authorization cards, also testified that she was aware of Gentry's support the Union.

Gentry worked in the Audubon Hospital's coronary care unit for 16 years until September 1997, when that unit was absorbed into the open-heart unit (OHU). In the coronary care unit, she had extensive experience treating patients who had the balloon angioplasty procedure. After 1997, angioplasty patients were normally treated in the cardiovascular unit. Such patients were generally treated in OHU, where Gentry worked, only if they had some additional medical condition other than a cardiovascular problem.

Randa Bryan, who became the manager of OHU in February 1999, and, thus, Gentry's supervisor, considered Gentry to be "an excellent nurse" (Tr. 405). When testifying before the Kentucky Board of Nursing, Bryan acknowledged that Gentry "provided good care to her patients" and that "there have been many glowing comments about [Gentry]." Similarly, Helen Tate and Joanne Shackelton, nurses who worked with Gentry for many years, described her as "an excellent nurse."

At least some of the doctors who worked with Gentry at Audubon shared this view. In April 1997, Dr. Alan Lansing, called as a witness in the instant proceeding by Respondent, wrote:

I have known Jane for many years and I know that she not only delivers excellent patient care, but has also had good rapport with families as well as the medical and nursing staff. I have always observed her to be very responsive, courteous and conscientious. I regard her skills with great respect. [Tr. 928.]

Lansing agreed with the April 13, 2000 deposition opinion of Dr. William Schmidt that:

Initially when the CCU unit was opened, Nurse Gentry took care of the majority of my post angioplasty patients and did an excellent job

I always found her to be an outstanding nurse, probably one of the best nurses at Audubon. [Tr. 929; Jt. Exh. 1 pp. 52-53.]³

³ Portions of two depositions taken from Dr. Schmidt are contained in Jt. Exh. 1. The first was taken on October 18, 1999; the second on April 13, 2000.

Jane Gentry, however, was not universally popular. She was apparently very outspoken and alienated some people.⁴ In 1997, she was suspended by Columbia. The NPO filed an unfair labor practice regarding this suspension and the General Counsel issued a complaint. In June 1999, Columbia settled the matter by agreeing to make Gentry whole for any losses sustained by virtue of the suspension and to remove from her records any reference to the suspension.

Shortly after Norton began running the Audubon Hospital, Steve Williams, then the manager of the open-heart unit, called Gentry over and told her that he heard that Gentry had been making negative comments about Alliant.⁵ Williams told her that she was not to do that anymore because she wasn't giving Alliant a chance. He told Gentry that "they were going to be watching [her] to make sure that [she] had corrected [her] attitude [Tr. 172-173]."⁶

On October 8, 1998, Williams placed Gentry on a performance improvement plan. This discipline was initiated for Gentry's failure to take vital signs and perform "neuro checks" on a fresh postoperative patient on that day. It was also initiated for failure to treat a patient's elevated blood pressure and Gentry's alleged "bad attitude and conduct in the unit." On December 1 and 28, 1998, Williams met with Gentry and noted there were no complaints. His last note remarked, "No problems-no complaints-keep up the good work."

C. The June 21, 1999 Incident for which Gentry was Fired

On June 21, 1999, Dr. William Schmidt performed a balloon angioplasty and stent placement on Faye Jeannette, a 90-pound, 61-year-old woman, in Audubon's cardiac catheterization laboratory. The procedure entailed the insertion of a tiny balloon fed through a wire into the patient's coronary artery, which was then inflated to push back the plaque that was inhibiting blood flow. Thereafter, a stent, made of titanium steel mesh, was opened to support the artery walls.

Jeannette's surgery was successful with no complications. At about 4:25 p.m., a nurse in the cardiac catheterization laboratory administered morphine to Jeannette in response to the patient's complaints of back pain (GC Exh. 60(a) p. 22). At about 5 p.m., Jeannette was transferred to the open-heart unit, where Gentry, who was working the 3 to 11 p.m. shift, was assigned to care for her.

Patients who have had an angioplasty are normally sent to the cardiovascular unit. Jeannette, however, was sent to the open-heart unit because she had a complicated medical history. A heart attack (myocardial infarction) had been arrested and

⁴ I decline to credit the testimony of Chris Ballard, the charge nurse in OHU on June 21, due to the personal animosity he has towards Gentry, which is very apparent from his testimony. Ballard's testimony on direct, for example, appears calculated to cast Gentry in the very worst light, particularly when compared to his testimony on cross-examination.

⁵ Alliant did not change its name to Norton Healthcare until January 1999.

⁶ Gentry's testimony regarding this conversation is uncontradicted. Steve Williams, the manager of the OHU, is a different person from Steve Williams, the CEO of Norton.

aborted by the administration of Heparin at Suburban Hospital in Louisville, before Jeannette was transferred to Audubon. However, Jeannette did not have a heart attack at either Suburban or Audubon:

The main reason [Jeannette] was placed in the open-heart unit on the procedure was not based on her cardiac risk factor but my view was based on her gastroenterology risk factors in view of her having a GI bleed at Suburban Hospital and the need to treat her with IV aggrastat which is a platelet inhibitor which significantly increases someone's risk for bleeding. She was placed in the open-heart unit primarily for close observation to look for hemorrhaging of her colon. [Jt. Exh. 1, Schmidt deposition of April 13, 2000, p. 51.]

At about 6:15 p.m., Gentry received Dr. Schmidt's standing orders. The open-heart unit secretary bracketed the orders and Gentry signed under the bracket indicating that she was aware of them. No one is allowed to make any entries inside the brackets. The brackets are intended to show what was ordered for the patient at the time the patient was assigned to the unit. Changes in the orders are to be noted elsewhere on the patient's chart (GC Exh. 60(a), pp. 37–38).

Two IV lines were attached to Jeannette. One was to be designed to re-hydrate the patient and the other to deliver aggrastat in order to prevent clotting. If Jeannette complained of chest pain, Dr. Schmidt's orders were to perform an EKG and administer a 0.4 mg patch of nitroglycerine—if her systolic blood pressure was above 90. Schmidt generally does not order morphine for angioplasty patients because, on the basis on his experience in performing approximately 900 angioplasties, virtually no patient experiences chest pain related to an this procedure, if treated with aggrastat (Jt. Exh. 1, pp. 28–30). Moreover, morphine “can be a dangerous drug because [patients] can become over sedated and stop breathing” (Jt. Exh. 1, deposition of April 13, 2000 at 49). Schmidt did not order morphine for Jeannette. Although the preprinted standard order form has a space for a morphine order, the space was blank when Gentry signed the orders (GC Exh. 60(a) pp. 37–38). The only pain medication Schmidt prescribed was percocet, “as needed” every 3 hours—for noncardiac chest pain.

While Gentry was doing her initial assessment of Jeanette, the patient woke up screaming that she was dying; that someone had to help her because she was in such pain. Gentry looked at a monitor to which Jeanette was attached. The monitor indicated that Jeannette's EKG rhythm, heart rate, blood pressure, and oxygen saturation were normal. She then injected 1 CC of saline, which is salt water, an inert substance into the aggrastat IV. Gentry may have done this in whole or in part to flush the IV line. She may also have done this to placate Jeannette. The patient immediately went back to sleep.

At about this time, Dr. Schmidt came up to the open-heart unit to check on his patients. While Schmidt was attending to another patient, Gentry approached him and told Schmidt that Jeannette was anxious and complaining of chest pain, which she believed was unrelated to her heart. Gentry also told Schmidt either that she flushed Jeannette's IV with saline, or that she had administered saline, and that the patient had gone back to sleep. Schmidt nodded and prescribed xanax to treat

Jeannette's anxiety. He did not indicate to Gentry that she had done anything improper, nor did he prescribe any additional medication for chest pain.

At about 7 p.m., or shortly thereafter, Gentry went on her lunchbreak. She asked Diane McNutt, a registered nurse then employed by a temporary staffing agency, to watch Jeannette for her. After Gentry had been gone for about 5 or 10 minutes, Jeannette started screaming and pressed her call light to summon a nurse. When McNutt entered her room, Jeannette was clutching her chest, complaining of pain at the highest level of intensity (10 on a scale of 1–10). McNutt looked on the standing orders for a morphine order and didn't see one. Nurse Alicia Croney assisted her in performing an EKG and McNutt administered nitroglycerine at 7:40 and 7:45 p.m. McNutt asked Registered Nurse Rebecca Kiesler to check the chart to see if she had missed a morphine order.

Kiesler testified that she called Dr. Paul Loheide, the resident on duty for Dr. Schmidt's practice, and that she obtained from him an order for morphine 2–4 mg to be administered as needed via an IV, but no more frequently than every hour. Dr. Loheide testified before the Kentucky Board of Nursing on April 18, 2000, that he does not recall Faye Jeannette. However, he testified as to his general practice if he received a call from a nurse in OHU about a patient complaining of chest pain 3–4 hours after an angioplasty and stent placement. Dr Loheide stated he would direct the nurse to do an EKG and then would go see the patient in person to evaluate the situation. Further, he testified that he would not order morphine over the phone because there is no way to determine the source of pain without examining the patient.

Kiesler filled in a morphine order on the original standing orders, which she and Norton concede is improper. Furthermore, she did not record the name of the physician who gave her the order, which is a violation of Audubon's patient care manual (GC Exh. 59; Tr. 904–08). With regard to telephone orders, this manual requires:

4. All telephone orders must be signed by a physician within 24 hours.⁷

5. The nurse accepting the orders must repeat them for confirmation prior to the termination of the conversation.

6. Telephone orders are to be designated by the letters T.O or P.O. (med, dose, route, freq T.O. Dr. Jones per Jane Does, RN/LPN).

As to requirement 4, no physician signed the morphine order for Jeannette until some time after October 21, 1999, over 4 months after the order was allegedly taken. Dr. J. A. Lash's name was stamped inside the brackets containing the order after October 21 (Tr. 635–641, 904–905).⁸ If Dr. Loheide prescribed morphine over the phone, a written order should appear on page 32 of Jeannette's medical records indicating that Kiesler obtained the order from Loheide and it should have been signed by a physician no later than 7:45 p.m. on June 22.

⁷ That this is Audubon Hospital policy was confirmed by Dr. Alan Lansing, called by Respondent as an expert witness (Tr. 904–08).

⁸ From an examination of exhibit GC Exh. 60(b) pp. 32, 37, and 38, I conclude that the name of Dr. Lash is stamped on the order, not written.

McNutt administered morphine to Jeannette at about 7:45 p.m. When Gentry returned from lunch, McNutt told her what had transpired, that morphine had been administered and that Jeannette was angry with Gentry. Gentry went into Jeannette's room and the patient was still complaining of chest pain. Her EKG and blood pressure were essentially unchanged. Jeannette was hysterical, saying, "I'm dying, you've got to help me" and repeating "I have to have a shot."

Gentry injected another CC of normal saline into Jeannette's IV and the patient fell back to sleep. She could not have administered additional morphine because an hour had not elapsed since it had been administered by McNutt. She could have, but did not, administer xanax thru the patient's g-tube to relieve her anxiety. Later, when Jeannette was complaining of back pain and was having trouble sleeping, Gentry gave her xanax and percocet.

Gentry angrily confronted both McNutt and Kiesler about the administration of morphine. She told McNutt that Jeannette's complaints of chest pain were psychological and that the patient did not need morphine. When she discovered that Kiesler had written the morphine order on the initial standing orders, Gentry berated Kiesler for improperly documenting the order and making it appear that Gentry had acknowledged the order. She may also have implicitly questioned whether Kiesler actually obtained the order from a physician.

Before leaving work at 11:30 p.m., Gentry attempted to discuss her concerns with the charge nurse on that shift, Chris Ballard. Ballard, who had worked 16 hours that day told Gentry that he was tired and asked her to send him an e-mail. Diane McNutt then assumed responsibility for Jeannette's care. During her shift, McNutt noted that Jeannette complained of pain constantly and was crying and easily upset. The patient's pain complaints related to both her chest and back (GC Exh. 60(a), p. 55). At 6 a.m. on June 22, McNutt gave Jeannette morphine without administering an EKG and nitroglycerine first. In doing so, McNutt did not comply with Dr. Schmidt's order (Jt. Exh. 1, Schmidt deposition of April 13, 2000, p. 59). Later the same day, nurses administered morphine three times without administering nitroglycerine beforehand (GC Exh. 60(a) p. 41). McNutt also failed to carry out Dr. Schmidt's order to discontinue aggrastat, the blood thinner, at 3:31 a.m. (GC Exh. 60(a) p. 40).

Faye Jeannette left Audubon Hospital on June 23, 1999, in stable condition after an uneventful stay. Jane Gentry did nothing during her care of Jeannette that had any adverse effect on the patient, including her administration of normal saline (Jt. Exh. 1, Schmidt deposition of April 13, 2000, pp. 10 and 52).

D. Respondent's Investigation of Jane Gentry

Gentry was off of work to attend a seminar for several days. Upon her return, on June 28, 1999, Jane Gentry sent an e-mail to Chris Ballard, Supervisor Ladonna Thomas, and Randa Bryan, the manager of the open-heart unit. This was the first time anyone from Norton management became aware of any controversy concerning the nursing care of Faye Jeannette on June 21. The patient was unaware of any controversy and neither her family nor any physician had complained about any nurse's conduct.

The thrust of Gentry's email is her concern about Rebecca Kiesler's improperly entering the morphine order on the initial standing orders. However, the letter rather ambiguously raises doubts as to whether Kiesler had obtained the order from a physician:

I asked Diane [McNutt] how she had given the M/S [morphine] because the [patient] didn't have an order. She stated that Becky [Kiesler] had written the order. I had difficulty finding the order until I looked at the initial orders. Becky had written the order on the routine order sheet which had already been taken off.⁹ I'm concerned about the legality of a nurse writing orders on a patient which she was unfamiliar with, had not taken report on, & without talking to the doctor. More important, I'm concerned about her writing an order on orders at the back of the chart, which had already been taken off. I would rather anyone not write above my signature on medical records. This makes me liable for facts which I have not seen & I consider that actions like that could be construed as altering medical records. Please respond, so I will have guidance for future incidences such as this. [GC Exh. 63.]

Bryan commenced an investigation and interviewed Kiesler, McNutt, Gentry, Alicia Croney, and Chris Ballard. When Bryan met with Gentry, Gentry told her that Jeannette did not need morphine and that she had gone back to sleep when Gentry injected one CC of normal saline into her IV. Gentry not only complained to Bryan about the manner in which the morphine order was documented, she also questioned whether Kiesler had obtained the order from a physician. Bryan asked Gentry if she had documented the administration of saline on Jeannette's chart; Gentry said she had not.

Bryan told Gentry that she had administered a placebo and that as a result Bryan thought that Gentry might have to be reported to the Kentucky Board of Nursing (KBN). Bryan was not certain that Gentry had to be reported to the KBN; indeed, she "had questions whether or not this was really a Board reportable offense" (Tr. 771). Bryan asked Gentry if she would ever "do it" again and Gentry told her that she would not if Bryan told her not to do so.¹⁰

⁹ "[T]aken off" means the initial orders had been signed by the unit secretary as final and complete.

¹⁰ I credit Gentry over Bryan and find that Gentry at no time indicated that she would either administer normal saline to a patient who was complaining of pain, or administer a placebo, in defiance of Bryan's instructions. Gentry was aware during the conversation with Bryan that Respondent might take disciplinary action against her and would likely have appreciated that such an expression of defiance would cause her termination. In view of this, I deem it very unlikely that Gentry indicated that she would use saline in this manner again—if Bryan forbid it.

Bryan's notes (Exh. R-23, p. 8) make it clear that after some discussion Gentry said, "[S]he did not feel that she had done anything wrong, but if I did, I should reprimand her, and she would not do it again, if I told her not to."

Similarly, before the Kentucky Board of Nursing on April 18, 2000, Bryan testified:

She admitted over and over in the office that she had done it. She did nothing—that normal saline was a medication. She did nothing—she hadn't done anything wrong. But if I felt that she had done something

Bryan called Sandra Johanson, manager of the KBN's consumer protection branch. She asked Johanson if the administration of normal saline, in lieu of the patient's pain medication, violated the Kentucky Nursing Laws and if it was reportable. Johanson answered in the affirmative. There is no Kentucky statute or regulation that prohibits Gentry's conduct, whether or not it constitutes the administration of a placebo, as alleged by Respondent. Similarly, the KBN has not issued any guidelines or advisory opinions even prohibiting the administration of a placebo. Audubon Hospital also has no written or oral policy prohibiting the administration of a placebo either and Gentry had never been told that doing so was against hospital policy until her conversations with Bryan in early July 1999.

Bryan also interviewed Dr. Schmidt, who in response to her inquiry, said he would not prescribe normal saline to treat complaints of pain.¹¹ Bryan also thoroughly reviewed Gentry's email and reviewed Fay Jeannette's chart "extensively." She discovered that nurse Rebecca Kiesler wrote the morphine order above Gentry's signature:

I have discovered a problem however, and that is when Becky obtained the order for the morphine, she did write it in the space above Jane Gentry's signature, so therefore, the order could have easily been missed, since the orders were already transcribed. The problem was that Becky should have written the order on the front of the order sheet, instead of the back, but she did follow protocol. Becky and I have discussed this, and I will make a note that she wrote the order in the wrong place on the chart, and as I have mentioned, Becky is aware of the problem. [R. Exh. 23, p. 11.]

On July 9, Bryan filled out a "Personal Quality Improvement Plan" for Kiesler dealing solely with the location of the morphine order (GC Exh. 78 (p)). Bryan did not contemplate any

wrong, then I should tell her and reprimand her and she wouldn't do it again [Exh. GC 72 at p. 9—the quotation appears to be mistranscribed in that Gentry obviously contended that saline is not a medication, see Tr. 265–267].

I deem Bryan not to be a credible witness. I deem her testimony at Tr. 758–759 to be deliberately misleading as to where she and Gentry left the issue as to whether Gentry would administer saline in the future in the manner in which she administered it to Jeannette. I also find her testimony as to when she became aware of Gentry's contention, that Rebecca Kiesler never obtained a physician's order for morphine on June 21, to be evasive (Tr. 766, 801). I, therefore, credit Gentry's testimony at Tr. 250 that she raised the issue of whether Kiesler had obtained a physician's order for morphine with Bryan at their initial meeting about this incident.

¹¹ In his deposition of October 18, 1999, Schmidt testified that Gentry's administration of saline to his patient was a "serious break in protocol" because his preprinted orders do not mention the administration of a placebo. Schmidt expects no deviation from these orders (Jt. Exh. 1, October 18, 1999, deposition at 16–18). Dr. Schmidt's opinion in this regard appears somewhat inconsistent with his conduct on the evening of June 21. Gentry told him that evening that Jeannette was complaining of chest pain, which Gentry believed was not related to her heart. She also told Dr. Schmidt that she treated Jeannette with normal saline. Schmidt neither reprimanded Gentry nor prescribed additional medication for chest pain. Indeed, he indicated agreement with Gentry's assessment by prescribing xanax.

consequences of this mistake for Kiesler other than it was a "learning experience."

Nowhere in her notes or in Kiesler's improvement plan did Bryan mention the fact that Kiesler did not record the name of the physician in the order. Neither did she note that although two weeks had passed since June 21, a physician had still not signed off on the morphine order in direct contravention of Audubon Hospital policy that telephone orders be signed by a physician with 24 hours. Bryan made no inquiry to either Dr. Schmidt or Dr. Loheide as to why the order had not been signed or whether Dr. Loheide actually gave the order.

On July 12, 1999, Respondent terminated Gentry solely on the basis on the saline administration of June 21, and the next day filed a report with the KBN. The termination notice (GC Exh. 69) describes the offense for which Gentry was terminated as follows:

During general discussion with Randa Bryan, it was revealed that Ms. Gentry prescribed and dispensed a medication to a patient under her care. This medication was not ordered by a physician, nor was its administration documented in the patient's chart.

Saline is commonly used by nurses in flushing IV lines. It is not a medication. Nurses do not need a prescription or doctor's orders to use it in flushing IV lines and its use is generally not required to be documented on a patient's records.

Respondent made no report or inquiry to the KBN regarding Rebecca Kiesler's documentation of the morphine order. In this regard, section 314.031(4) of the Kentucky statutes pertaining to nurses, provides:

It shall be unlawful for any nurse, employer of nurses, or any person having knowledge of facts to refrain from reporting to the board a nurse who:

....
(i) Is suspected of falsifying or in a negligent manner making incorrect entries or failing to make essential entries on essential records.

E. Proceedings Before the Kentucky Unemployment Insurance Commission

Respondent contested Jane Gentry's claim for unemployment insurance benefits. On August 19, 1999, Gentry appealed from an initial determination that she was discharged for misconduct connected with her work. A referee of the Kentucky Division of Unemployment Insurance affirmed that determination. However, in March 2000, the Commission reversed this finding (GC Exh. 5).

The Commission observed that, "while the claimant admits to administering one cc of normal saline on two occasions when the patient complained of pain, the evidence falls far short [of establishing] that claimant was knowingly violating rules when she did so." The Commission "was not persuaded that [Gentry] was deliberately violating or disregarding the standards of behavior which the employer had the right to expect of her." A decision of the Kentucky State agency may have probative weight in an NLRB proceeding, but is not determinative, *Dynatron/Bondo Corp.*, 324 NLRB 572, 585 fn. 54 (1997).

*F. Proceedings Before the Kentucky Board of Nursing
Involving Gentry*

After the KBN receives a complaint, its prosecuting attorney makes a recommendation about whether to proceed with an investigation. If he does so, one of five investigators is assigned to the complaint. If the matter cannot be resolved amicably, a hearing may be held before a hearing officer and 2 members of the 16-member KBN board. The full board makes a final determination about what action to take and can accept or modify the panel's recommendation or remand the case to another panel. A nurse can appeal the KBN's decision to the State Circuit Court, in this case the Jefferson County Circuit Court.

On July 10, 2000, a hearing panel rendered a proposed decision recommending dismissal of the charges against Gentry. The KBN prosecuting attorney filed exceptions to the decision, which was remanded back to the hearing panel. The panel offered a second proposed decision on September 25, 2000, again recommending dismissal of the charges. The prosecuting attorney again filed exceptions. The full Board then entered a decision that Gentry be placed on limited/probated status for at least one year (GC Exh. 9, pp. 2-3). Gentry appealed the KBN decision.

The Circuit Court reversed the decision of the KBN in April 2001. The Nursing Board appealed the judge's decision to Kentucky Court of Appeals. In August 2002, in a unanimous decision, the court of appeals affirmed the Circuit Court Judge. Judge Knoff, in a concurring opinion, observed, as did the Circuit Judge, that there was no evidence that Gentry's actions placed the patient in any risk of injury. Moreover, Judge Knoff opined, "[e]ven accepting the Board's decision that Gentry administered the saline solution as a placebo to relieve the patient's pain, there was no basis for the Board's conclusion that Gentry's conduct amounted to a violation of the applicable standards relating to nursing" (GC Exh. 10 at p. 5). This matter is apparently pending before the Kentucky Supreme Court.

*G. Proceedings Before the Board of Nursing Involving
Rebecca Kiesler*

On September 16, 1999, Jane Gentry filed a complaint with the KBN concerning Rebecca Kiesler's conduct on June 21, 1999. Gentry alleged that Kiesler

wrote an order for morphine on standing orders after the orders had been transcribed, and signed off by both Doctor Schmidt and [Gentry]. She did not write that the morphine order was a phone order, she did not write the name of the doctor with whom she spoke, she did not sign her name, nor did she note the time and date of the order

I have great concerns whether or not a doctor was even called

Gentry also noted that no doctor signed off on the morphine order that Kiesler wrote, in violation of written Audubon policy.

Norton provided and paid for the services of Grover C. Potts Jr., counsel in the instant matter, to represent Kiesler before the KBN. Potts accompanied Kiesler to the investigative meeting with KBN Investigator Judy Amig and submitted a letter to

Amig on Kiesler's behalf. Chief Nursing Officer Cis Gruebbel and Supervisor Ladonna Thomas submitted statements to the KBN on Kiesler's behalf.

The KBN's credentials review panel determined that the KBN would initiate no formal action. The Board expressed concern with the fact that Kiesler "did not properly document the order for pain medication given to her by the resident." No investigation was made of Gentry's concerns as to whether any physician had given the morphine order. At the time that Amig received Faye Jeannette's medical records, a physician had still not signed off on the morphine order. There is no indication that anyone asked Dr. Loheide about the order until April 18, 2000, at the KBN proceeding involving Gentry.

Analysis

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must show that union activity or other protected activity has been a substantial factor in the employer's adverse personnel decision. To establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity, and an adverse personnel action caused by such animus or hostility. Inferences of knowledge, animus and discriminatory motivation may be drawn from circumstantial evidence as well from direct evidence.¹² Once the General Counsel has made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981).

There is no dispute that Gentry engaged in protected activity and that Respondent was aware of it. Additionally, animus towards the activities of the NPO is established by the Board decisions discussed at the outset of this decision. Four months before Gentry's discharge, Norton violated the Act in issuing a written warning to NPO Representative Susan Yost and 1-1/2 months before Gentry's discharge, it demonstrated its animus towards the NPO by implementing a stricter solicitation policy to thwart the NPO's renewed organizational drive. A month after Gentry's discharge, Respondent demonstrated its anti-union animus again by failing and refusing to employ Wilma McCombs, an NPO executive board member.

Respondent's specific animus towards Gentry was demonstrated by Supervisor Steve Williams' warning to her about making negative comments about Alliant. Animus towards Gentry and her union activities, and discriminatory motivation for her discharge and the report to the KBN, however, is more conclusively established by the pretextual nature of the reasons given for these actions.

Respondent's decision to terminate Gentry appears extraordinary even without a comparison to its treatment of other nurses. Gentry was a highly regarded nurse, who had worked at Audubon for 18 years. Her administration of normal saline to Faye Jeannette did not harm or potentially harm the patient.

¹² *Flowers Baking Co.*, 240 NLRB 870, 871 (1979); *Washington Nursing Home, Inc.*, 321 NLRB 366, 375 (1966); *W. F. Bolin Co. v. NLRB*, 70 F. 3d 863 (6th Cir. 1995).

Neither the patient, the patient's family nor any physician reported this incident to Norton; indeed, the incident was self-reported by Gentry.

It is also extraordinary for an employer to fire such an employee, when the employee's conduct did not violate any of the employer's rules or any statute or regulation. Assuming that her conduct is contrary to a widely held aversion to placebos in clinical practice, Gentry had never been told that this was the case. Finally, when Respondent's discharge of Gentry and its report to the KBN are compared to its disparate treatment of other nurses' mistakes, it becomes obvious that the reasons stated for taking these steps with regard to Gentry are pretextual.

It is well settled under the National Labor Relations Act, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal, *Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991); *Fast Food Merchandisers*, 291 NLRB 897,898 (1988); *Shattuck Denn Mining Corp.*, 362 F.2d 466, 470 (9th Cir. 1966). I draw such an inference with regard to both Gentry's discharge and the report to the KBN.

In a case arising under the Age Discrimination in Employment Act, the Supreme Court reiterated the probative value of an employer's pretextual reasons for a personnel action in proving discrimination:

Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive...In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." . . . Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000).

A good starting place in analyzing this case is the testimony of Dr. Alan Lansing, a cardiovascular surgeon, called as a witness to testify about the disciplinary files of 24 Audubon nurses, which had been produced to the General Counsel pursuant to a subpoena. These files had been reviewed earlier in the hearing by Dr. Linda Peeno, who was called as an expert witness by the General Counsel. Dr. Lansing stated:

Out of those twenty-four, over that period of time, only two were dismissed. They were dismissed for the fact that one had broadcast lewd comments over the public address system and the second violated patient information that should have been personal and private. I think that both of those are reasonable.

Any you say, what about all the rest of them? Well, sometimes they say, "Well, we will let them have another chance and maybe another chance."

....

I have to say that I respect the members of the committee who went over these, because it is obvious that each time they are trying to help the nurse. They are trying to give him or her a second or a third chance rather than immediately fire them because they were abusive or the language was bad. [Tr. 896-897.]

... I thought they did an excellent job of trying to assist the nurses who were reported rather than immediately firing them or laying them off or some other problem.

It would have been easy in some of these, with the language that is described, to say, "We can't stand that, You are out of here."

But, instead, they tried to help the nurses. It takes a great deal of restraint on the part of the reviewers in these situations not to react seriously against them. [Tr. 898.]

Dr. Lansing's observations are not surprising in view of the fact that Respondent and indeed, the healthcare industry, has been faced with a critical shortage of nurses during the 1998-2002 time period. Dr. Peeno, a physician and healthcare consultant, testified for the General Counsel, about the factors she would expect a hospital to take into account when disciplining a nurse for misconduct. She opined that she would expect that the hospital would consider such factors as whether the patient was harmed by the nurse's misconduct, whether there was potential harm to the patient, whether the hospital had a rule that prohibited the actions of the nurse and the nurse's disciplinary history.

According to Mary Cis Gruebbel, Respondent's chief nursing officer, these considerations are not determinative when Norton decides whether to terminate a nurse and/or report a nurse to the KBN. Gruebbel testified that what distinguishes Gentry from a number of other Audubon nurses who either made mistakes or intentionally deviated from a physician's orders was that Gentry was practicing "outside the scope of her license" when she administered saline to Fay Jeannette. Gruebbel explained that a nurse who practices outside the scope of their license will, in accordance with Audubon policy, be terminated and reported to the KBN. A nurse who merely makes a mistake or intentionally disregards an physician's order possibly will neither be terminated nor reported—so long as she is not practicing outside the scope of her license.

Respondent's brief summarizes Gruebbel's testimony as follows:

In evaluating a given situation, Gruebbel focuses her attention on the nurse practice issue as to whether or not the nurse's actions were within the scope of practice of the nurse's license. If the incident is within the scope of practice of the nurse's license, the nurse may be disciplined or put on a performance improvement program as a result of the infraction. However, if Gruebbel determines that the nurse's action is outside of the scope of practice of the nurse's license, the nurse is terminated. This is a "bright line" determination that has been applied consistently. . . . While the General Counsel may argue

that Norton should take into account the risk to the patient in making its determination, that is not the standard which is used. . . . [R. Br. 32–33.]

Neither Gruebbel's testimony nor Respondent's contention in its brief can be reconciled with the Kentucky Nursing Statutes or Respondent's practice in disciplining its nurses. Indeed, from a review of the records of the numerous Audubon nurses who have been counseled and disciplined since Norton took over the hospital in September 1998, I conclude that Respondent's stated reasons for terminating Jane Gentry and reporting her to the KBN are pretextual and that a significant motivating factor for both steps was to retaliate against Gentry for her union activity and to discourage others from supporting the NPO. It is obvious that Gentry was treated far more harshly than virtually any other nurse whose conduct was in any way comparable. Many of these nurses clearly acted "negligently or willfully in a manner inconsistent with the practice of nursing" and were neither terminated nor reported to the KBN.

The Nursing Statutes in relevant part provide:

Section 314.011 (6) "Registered nursing practice" means the performance of acts requiring substantial specialized knowledge, judgment, and nursing skill based upon the principles of psychological, biological, physical, and social sciences in the application of nursing process in:

....

(c) The administration of medication and treatment as prescribed by a physician, physician assistant, dentist, or advanced registered nurse practitioner and as further authorized or limited by the board and which are consistent with American Nurses' Association Standards of Practice established by nationally accepted organizations of registered nurses. Components of medication administration include, but are not limited to:

1. Preparing and giving medications in the prescribed dosage, route and frequency; (emphasis added)

Section 314.031. Unlawful acts relating to nursing.

(4) It shall be unlawful for any nurse, employer of nurses, or any person having knowledge of facts to refrain from reporting to the board a nurse who:

....

(c) Is suspected of negligently or willfully acting in a manner inconsistent with the practice of nursing; (emphasis added) or

(d) Is suspected of being unfit or incompetent to practice nursing by reason of negligence or other causes including, but not limited to, being unable to practice nursing with reasonable skill or safety; or . . .

....

(h) Is suspected of abusing, misusing, or misappropriating any drugs placed in the custody of the nurse for administration, or for use of others, or

(i) Is suspected of falsifying or in a negligent manner making incorrect entries or failing to make essential entries on essential records.

Sandra Johanson, the manager of the KBN's Consumer Protection Branch, was called by Respondent to testify in this proceeding. Johanson confirmed that it is a violation of section 314.011(6) to vary the route of a medication that was prescribed by a physician, e.g., administering a drug through an IV, in contravention of the doctor's orders to administer it into muscle. Johanson also confirmed it would violate the statute for a registered nurse not to administer a drug ordered by a physician. Finally, Johanson noted, consistent with the plain language of its statutes, that Kentucky is a "mandatory reporting state;" employers, nurses and other individuals are required to report suspected statutory violations to the KBN.

Similarly, RN Barbara Lee, an assistant professor of nursing at Bellarmine University, who was called as a witness by Respondent, testified:

Q. If a nurse decided for example that a doctor decided something should be given intra-muscularly, and she felt, "Well, this patient's going to be a little easier if I do the IV", is there anything wrong with that?

A. Yes.

Q. What's wrong with that?

A. It's against the law.

Q. . . . Would it be within the scope of the nurse's license to make that decision?

A. No. [Tr. 872.]

Cis Gruebbel's testimony at transcript 972–973, which is inconsistent with that of Respondent's witnesses Johansen and Lee, is a factor in my determination that her testimony is generally incredible.

This record is replete with instances in which Audubon nurses violated the Kentucky Nursing statutes and were neither terminated nor reported to the KBN; some instances in which the nurses violated the statutes and were reported but not fired and some in which the nurse was fired and not reported. Some of the more obvious instances in which Audubon nurses did not comply, either intentionally or negligently, with the standards of "registered nursing practice" and were neither reported nor terminated are as follows:

1. Natalie McBride

On November 26, 1998, nurse Natalie McBride knowingly administered insulin to a patient underneath his skin rather than through his IV as ordered by Dr. Walter App. This patient suffered from severe sclera derma which might interfere with the absorption of insulin if administered underneath the skin. Insulin poorly absorbed may not produce the result intended by the physician, i.e., lowering of the patient's blood sugar.

Dr. App became angry when he discovered that the insulin had not been administered through the patient's IV and directed Jane Gentry to fill out an "occurrence report." Gentry did so and gave it to Steve Williams, then the manager of the OHU. No action was taken against McBride.

2. Jane Bennett

In February 2000, Registered Nurse Jane Bennett administered pain medication through an IV rather than into the patient's muscle, as ordered by a physician. She did so deliberately because the patient objected to getting an injection into

the muscle. Bennett committed a second violation of the Kentucky Nursing laws by not indicating on the patient's chart that she had administered the medication via the IV. Bennett was given a final written warning for these offenses. Audubon did not report Bennett to the KBN despite the fact that Sharon Conway, Respondent's director of critical care, and Judy Kees, Respondent's human resources director, were aware of the violations.¹³

3. Michelle Reed

In April 2002, Respondent fired Michelle Reed, a licensed practical nurse (LPN) for three separate instances of misconduct within a 3-day period, which included administering medication, which she had previously thrown in the trash. It also reported her to the Kentucky Board of Nursing. However, Audubon was rather lenient in dealing with Reed in July 2000, when she administered pepcid, a medication prescribed for treatment of gastritis or an ulcer, orally, rather than via the patient's IV, as ordered. Reed also did not document this on the patient's chart.¹⁴ Michelle Reed was merely counseled for this conduct and not reported to the KBN. During 2000 and early 2001, there were other instances of misconduct involving Reed, involving absenteeism and patient care.

4. Jamie Sullivan

In October 1998, Sullivan, an RN, administered a cardiac medication at a much faster rate than ordered. As a result the patient experienced a rapid increase in the ventricular rate in the heart. Sullivan's mistake was potentially fatal for the patient, who had to receive additional medication to reverse the effects of her medication error. Supervisor Steve Williams counseled Sullivan, but took no further action with regard to this incident. Audubon did not report Sullivan to the KBN.

5. Janet Bertolli

In January 2001, Randa Bryan, who had been Gentry's immediate supervisor, suspended RN Janet Bertolli for 3 days for three instances of misconduct within 2 weeks. She was not reported to the KBN. One incident necessitated a patient receiving home health care after he left Audubon to rectify skin damage resulting from Bertolli's misconduct. In another incident, Bertolli failed to execute an order to remove a ventilation tube. When the treating physician became upset, Bertolli became confrontational with the doctor. The third incident came to Respondent's attention via complaints from the patient's family, including Bertolli's refusal to provide the patient with a "spit basin."

On June 1, 2000, Randa Bryan counseled Janet Bertolli for two instances of misconduct within the same week. Bertolli turned on and connected a ventilator without the presence of a respiratory therapist. When the ventilator alarm sounded, Bertolli silenced it instead of performing basic troubleshooting and

checking the settings, which were incorrect. The alarm had been sounded because the patient was still paralyzed and not breathing.

A few days later, Bertolli didn't check the IV nutrition order sheet and gave her patient the wrong nutrition order. Bryan did nothing other than counsel Bertolli and she was not reported to the KBN.

Four months earlier, Bryan and LaDonna Thomas counseled Bertolli after Respondent received complaints from a patient's wife. Bertolli failed to replace the EKG leads on several occasions when they came off—on a patient who had a heart attack on admission to the hospital. When the patient's wife asked Bertolli why an oral-gastric tube was not in place, Bertolli lied to her, and then lied to the patient's physician. She told the doctor that the patient had pulled the tube out, when in fact, it had come loose due to Bertolli's rough manipulation of the tube.

6. Susan Burrell

On November 11, 1999, due to LPN Susan Burrell's failure to make essential entries on a patient's records, the patient was not administered insulin properly and his or her blood sugar dropped to 34, a dangerously low level. Steve Williams counseled Burrell, who was not reported to the KBN.

7. Jutta Neary

Respondent placed Jutta Neary, an LPN, on a personal quality improvement plan on June 16, 2000. The reasons given for this action were as follows:

Medications omitted and not given within adequate time period, medication error, physician complaint regarding care of patient transferred to ICU [intensive care unit], inability to give accurate report to oncoming nurse, paperwork not being done for NH [nursing home] transfer. Ivs not being dc'd [discontinued] on NH transfer patients, dressing . . . not done as ordered, staples not removed as ordered, attempting to administer 90 u[nits] N insulin to wrong patient,¹⁵ not [discontinuing] diet order for NPO patient.

During the following week RN Jerry Perry's notes indicate little improvement in Neary's performance. There is no indication that Respondent terminated Neary or reported her to the KBN.

8. Cindy Morgan

On August 18, 2000, Nurse Cindy Morgan received counseling for making two drug calculation errors, not properly documenting them and failing to report these errors to her supervisor—even though she told her coworkers about them. No other disciplinary action was taken. No report was made to the KBN.

9. Mary Ann King

There are a number of disciplinary actions in the record regarding RN Mary Ann King. Among those most comparable to Jane Gentry's situation are the following:

¹³ Conway is Randa Bryan's immediate supervisor. Conway reports to Cis Gruebbel.

¹⁴ Pursuant to sec. 314.011(10), "License Practical Nursing Practice" includes "the administration of medication or treatment as authorized by a physician, physician assistant, dentist, or advanced registered nurse practitioner." The reporting requirements of sec. 314.031(4) apply to LPNs as well as RNs.

¹⁵ Administering such a large quantity of insulin to the wrong patient has the potential for fatal consequences.

On December 20, 1999, Norton placed King on a Personal Quality Improvement Plan for 1) not administering Coumadin as ordered on December 8, 1999; 2) giving another medication late on December 9 and 3) giving another medication late on December 17.

In February 2001, supervisor Kim Blair counseled King for being “verbally abusive and threatening body language” and refusing to leave Blair’s office when asked to do so.

In November 2001, King was counseled for administering the wrong medication to a patient.

In June 2002, Blair again counseled King for insubordination—she left the hospital when assigned from one unit to another.

Respondent never terminated King nor reported her to the KBN for her medication errors. King wore a union button when she went to Blair’s office in August 2000 for her performance evaluation, *Norton Audubon Hospital*, 338 NLRB No. 34, slip op. at 1 (2002). However, the fact that Respondent did not retaliate against all union supporters does not establish that it did not discriminate against Gentry, who was a far more prominent supporter of the NPO than King appears to have been.¹⁶

10. Janese Joyner

Norton fired LPN Janese Joyner in August 2001 for making obscene pages over the hospital PA system. A year earlier, she had been counseled for including a lung and abdomen assessment on a patient’s chart when she had not performed such an assessment. Joyner was not reported to the KBN.

11. Eucharia Igwe

Audubon disciplined RN Eucharia Igwe on a number of occasions in 2000 and 2001. Among the incidents for which she was counseled were the following: in April 2000, Nurse Manager Kim Blair counseled Igwe for not performing neurology checks as ordered on a patient who was admitted to the hospital after suffering a stroke.

In September 2000, Igwe was counseled for not responding quickly enough when a technician informed her of a dramatic drop in a patient’s heart rate. The patient’s heart had stopped beating.

In October 2000, Igwe was again counseled after administering a medication that was not supposed to be administered in her unit. Additionally, she did not have atrophine at the patient’s bedside as required.

¹⁶ Respondent also intimates that its treatment of LPN De Lois Doyle, an avowed union supporter, belies the notion that it discriminates against union supporters. First of all, the record does not indicate whether Norton was aware that Doyle was a union supporter until August 29, 2000, and there is no indication that she did anything that would have provided a basis for termination or reporting to the KBN. The complaints regarding Doyle after August 2000 relate primarily to her inter-personal skills, rather than the treatment of patients. Even with respect to earlier complaints, it appears that Respondent’s managers may have had difficulty establishing the validity of many of the complaints against Doyle, most of which appear to involve the manner in which she relates to other hospital staff members.

In October 2001, Igwe was placed on a performance improvement plan for several medication errors: One of these involved a deliberate failure to give 8 units of Lantus insulin. Igwe decided to ignore the doctor’s orders because the patient’s blood sugar was 65. Supervisor Kim Blair noted that Lantus insulin is to be administered regardless of blood sugar.¹⁷ Other errors were discovered pursuant to patients’ complaints that they were not receiving their prescribed medications.

12. Janie Huber

On the basis on an incident, which occurred on January 31, 2002, Norton demoted RN Janie Huber from her position as clinical coordinator for the intensive care unit. She was also suspended for 3 days. The incident for which Huber was disciplined was described as follows in the hospitals management report:

On January 31st¹, 2002, Janie Huber RN Clinical Coordinator for ICU was in charge of the ICU-A and ICU-B. The ICU-B carries 6 clients and the ICU-A carries 7 clients. Two RNs from the ICU-B went down for break, Janie was watching the clients on ICU-B; the 2 RNs called Janie and asked her to come downstairs. Janie went to other side of unit and asked if someone could watch the other side of the unit. No RN could watch the ICU-B side at that time. Janie asked [a] respiratory therapist to watch the unit, he agreed to do so. Janie proceeded to go meet the other 2 RNs, visited a patient on the other floor, and was gone off the ICU-B for approximately 5 [minutes]. At this point, no licensed RN was watching patients on the ICU-B side.

After meeting with her supervisor and Critical Care Director Sharon Conway, Huber was reported to the Kentucky Board of Nursing. However, not only was she not fired, according to the management report:

Janie will be allowed to reapply for a clinical coordinator position in 6 months provided that no action has been taken by the Kentucky Board of Nursing on her nursing license, or until the Board has decided what action, if any, is to occur.

In October 1999, Huber was counseled after knowingly using IV tubing and an end cap that were no longer sterile after lying on the floor.

13. Rebecca Davis

RN Rebecca Davis is another Audubon nurse who has been disciplined on a number of occasions since Norton took over the hospital. In September 1998, Davis was placed on probation for 30 days for a number of instances of misconduct, including a failure to properly document the administration of narcotics.

¹⁷ Lantus is a long-acting insulin, generally used once a day to control blood sugar for a period of 24 hours. It differs from NPH, another basal insulin, in that it has no pronounced peak in its effectiveness. Regular insulin or Humalog insulin, on the other hand, act very quickly in lowering blood sugar and are ineffective after the passage of several hours.

14. Wendy Beaman

In December 2000, Respondent fired RN Wendy Beaman for falsely documenting on the patient's medication chart that she had changed a patient's dressing, when in fact she had not do so. While at first glance, Beaman's case appears to support Respondent's argument that Gentry was not treated disparately, a closer analysis indicates precisely the opposite. First of all, Norton did not report Beaman to the KBN despite the fact that her misconduct appears to be clearly reportable pursuant to section 314.031(4)(i).

Secondly, Beaman was on her third performance improvement plan. Kimberly Blair, a clinical manager in the cardiovascular unit, presented the last one to Beaman on November 28, 2000. Over the period of week in mid-November, Blair had received three complaints about the manner in which Beaman treated patients. She berated one for requesting nausea medication, threw a pillow at another and yelled at a third for spitting out medication. At the November 28 meeting, Blair told Beaman that immediate improvement in her conduct was necessary for Beaman to keep her job and that any patient complaint would result in her termination. Within a week, Blair was informed that Blair had falsely documented the dressing change. Gentry, in contrast, was afforded no opportunity to modify her behavior.

15. Employees who were Reported to the KBN

Between the time Norton began operating Audubon Hospital on September 1, 1998, through July 13, 1999, when it reported Gentry to KBN, Respondent reported only one other nurse to the Board. This nurse, Michelle Cole, was accused of diverting narcotics, an offense not comparable to Gentry's conduct. During the next 2 years, Norton Audubon reported only two nurses to the KBN, both for the diversion of narcotics.

Not until June 2001, nearly 2 years after Gentry's discharge and well after the General Counsel had alleged that Norton had violated the Act by reporting Gentry to the KBN, did Respondent report any nurse to the KBN, whose conduct was even remotely comparable to Gentry's. During those 2 years, there were many incidents, clearly reportable, which were not reported. I deem Respondent's reporting to the KBN of three nurses for patient care issues in mid to late 2001 to be totally irrelevant to the issue of whether Gentry was disparately treated. It may be that Respondent instituted a stricter policy in 2001—although if so, that policy does not appear to have been applied in a consistent and uniform manner.¹⁸ Similarly, I find the discharge of these three nurses irrelevant to whether or not Gentry was disparately treated in July 1999. For one thing Audubon may not have been as shortstaffed in 2001 as it was in 1998 and 1999 (see Cis Gruebbel's testimony at Tr. 946-949). It is also possible, as the General Counsel intimates at pages 33 and 34 of his brief, that Respondent adopted a stricter policy

¹⁸ For example, a uniform and consistently enforced policy should have resulted in the termination of Eucharia Igwe in October 2001, G.C. Exh. 78(m) at p. 4.

with regard to discharges and reporting to the KBN after a complaint was filed in the instant matter.¹⁹

Finally, Cis Gruebbel testified at transcript 970 that Respondent had no choice but to terminate Jane Gentry when it determined that she was "practicing outside the scope of her license." Despite this fact, in February 2002, Respondent determined that Janie Huber's conduct was reportable to the KBN, but did not terminate her. Norton decided to await the outcome of the KBN proceedings to determine what further action should be taken with regard to Huber. No such forbearance was accorded to Gentry.

Similarly, in the case of Donald Roundtree, Respondent exhibited a degree of leniency not extended to Gentry. On May 11, 2000, Norton dismissed Roundtree and reported him to the KBN for diverting Demerol for patients for his own use. A management report signed by Randa Bryan states:

When this occurred previously, Don agreed termination would occur in the event of reoccurrence. He will go to the Board and voluntarily submit his license. [R. Exh. 19.]

Although, it is unclear when the previous diversion of prescription medication took place, it is apparent that Respondent was aware of it and allowed Roundtree to continue working at Audubon Hospital.

16. The Rebecca Kiesler case

The General Counsel and Charging Party allege that Respondent's treatment of Rebecca Kiesler also indicates disparate treatment of Gentry. In this regard, Kiesler's charting error appears to be clearly reportable to the KBN, while Gentry's appears to fall into a gray area. Indeed, Randa Bryan testified that she called Sandra Johanson at the KBN because "I had some questions whether or not this was really a Board reportable offense [Tr. 771]."

There may in fact be a legitimate issue as to whether or not Gentry's conduct is properly characterized as the administration of a placebo. Dr. Linda Peeno testified that she would not necessarily consider Gentry's administration of saline to be a placebo. Dr. Peeno indicated that she would consider such conduct to be the administration of a placebo only if the patient was misled into believing that she was receiving pain medication, such as morphine, when in fact she was receiving saline in her IV. Respondent's counsel represented that it was not trying to suggest that Jeannette thought she was getting a pain medicine. Norton's position is that the patient's subjective appreciation of Gentry's administration of saline is irrelevant (Tr. 541).

Respondent and many witnesses apparently disagree with Dr. Peeno's opinion on this matter. However, there is no indication that Dr. Peeno's viewpoint is so far out of the mainstream that it should be disregarded. In arguing the impropriety of Gentry's actions, Respondent's relies on the personal views of its witnesses, their testimony as to what they've been taught about placebos and documents, such as a position statement by

¹⁹ Although Respondent has not offered copies of its reports to the KBN for the two nurses mentioned in Exh. R-22, the exhibit indicates that at least RN Patty Golden was reported.

the American Society of Pain Management Nurses.²⁰ The absence of any documents that would be binding on nurses in treating pain complaints suggests that there may in fact be conflicting points of view on this matter. Indeed, the KBN's Judy Amig, the nurse who investigated the complaint against Gentry, testified that she was not aware of any policy of the Nursing Board regarding the administration of placebos (Tr. 646).

Indeed, Kentucky law does not specifically prohibit a nurse from doing what Gentry did, regardless of whether it is characterized as the administration of a placebo or as a "diversion tactic" (Tr. 119-120). Similarly, neither Audubon Hospital nor Norton Healthcare had a rule prohibiting Gentry from administering saline in the manner in which she did on June 21, 1999. It has not been established that Gentry violated any universally accepted standard of nursing practice.

On the other hand, the Kentucky Nursing Statutes require the reporting of negligence in making incorrect entries or failing to make essential entries on essential records. Despite this fact, when she called Sandra Johanson at the KBN to ask about Gentry's alleged misconduct, Randa Bryan didn't mention Kiesler's improper charting or that Kiesler did not enter the prescribing physician's name on Faye Jeannette's medical records.²¹

Respondent treated Kiesler, an employee with no history of support for the NPO, very differently than Gentry. Not only did it fail to report her, it provided Kiesler with free legal counsel in her dealings with the KBN, while it did nothing to assist Gentry.

This record provides no basis for determining whether Kiesler did or did not receive a telephone order from Dr. Loheide on the evening of June 21. However, I conclude that antiunion animus is indicated by Respondent's failure to investigate whether she did or not, as well as its failure to report Kiesler to the KBN. When Randa Bryan reviewed Faye Jeannette's chart, it was obvious that there were significant irregularities with the morphine order—in addition to the fact that was charted in the wrong place. Kiesler had not entered the prescribing physician's name by the order, and it was obvious that Dr. Schmidt had not ordered the morphine.

Additionally, contrary to the hospital's internal regulations, no physician had signed off on the order. Under these circumstances, a manager, acting without a predisposition to exculpate Kiesler, would have at least tried to determine whether in fact Dr. Loheide, identified by Kiesler in her June 29 email to Bryan (GC Exh. 81), had given such an order and why no doctor had signed off on it 2 weeks after it was allegedly given. Bryan's lack of interest in this matter, I conclude, was also a result of her determination to use the care of Faye Jeannette to

discharge Jane Gentry, due to her activities on behalf of the NPO.²²

CONCLUSION OF LAW

Respondent, Norton Healthcare, Inc., d/b/a Audubon Hospital violated Section 8(a)(3) and (1) of the Act in terminating Elizabeth Jane Gentry on July 12, 1999, and in reporting her to the Kentucky Board of Nursing on July 13, 1999.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Elizabeth Jane Gentry, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Because the Respondent has a proclivity for violating the Act and because of the Respondent's egregious misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²³

ORDER

The Respondent, Norton Healthcare, Inc. d/b/a Norton Aududon Hospital, Louisville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting the Nurse's Professional Organization or any other union.

(b) In any manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

²² The failure of an employer to investigate the alleged improprieties of employees, not known to be union supporters, was found to indicate discriminatory treatment of union supporters in *Bohemia, Inc.*, 266 NLRB 761, 776 (1983), and *Standard-Coosa-Thatcher*, 257 NLRB 304, 322 (1981).

²³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²⁰ For example, Professor Barbara Lee testified that her university teaches that the use of placebos in clinical practice is always inappropriate in accordance with the "recommendations" of various organizations.

²¹ The KBN's Sandy Johanson recalled that Randa Bryan reported to her that Gentry had given a patient "normal saline in lieu of their pain medication" (Tr. 613). If Johanson's recollection is accurate, this report was misleading in suggesting that Gentry was supposed to administer pain medication and instead administered saline. Johanson's recollection is consistent with Exh. R-23, p. 1, the written material submitted by Respondent to the KBN.

(a) Within 14 days from the date of this Order, offer Elizabeth Jane Gentry full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Elizabeth Jane Gentry whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Elizabeth Jane Gentry in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Louisville, Kentucky hospital copies of the attached notice marked "Appendix."²⁴ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 12, 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., December 9, 2002.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge you, report you to the Kentucky Board of Nursing, or otherwise discriminate against any of you for supporting the Nurses Professional Organization or any other union.

WE WILL NOT in any manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Elizabeth Jane Gentry full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Elizabeth Jane Gentry whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Elizabeth Jane Gentry, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

²⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

NORTON HEALTHCARE, INC. D/B/A NORTON AUDUBON HOSPITAL